TO: Siting Committee September 11, 2001

FROM: William M. Chamberlain
Chief Counsel

RE: Possible amendment of 20 Cal. Code of Regs., § 1710

Introduction

On September 19th, the Commission will conduct a public discussion of proposed changes to the Commission's siting regulations, the purpose of which is to give my office guidance on what to file with the Office of Administrative Law to commence a formal rulemaking proceeding. One of the regulations under discussion is section 1710(a) and (h), which together establish an extraordinary rule that restricts the Commission staff's abilities to have private (non-noticed) discussions of substantive issues in the siting cases with any other party, including the applicant. I say the rule is extraordinary because I know of no other agency of the State of California that conducts adjudicatory hearings that has placed this sort of restriction on its staff. Proposed modification of this rule has generated substantial public controversy and has resulted in at least two proposals by commissioners and one more by the Siting Division staff. This memo provides additional discussion of section 1710's restrictions on staff conduct and offers a further alternative for the Commission to consider.

The History and Rationale for Section 1710 and the Problems it Presents

While the Warren-Alquist Act contains many provisions intended to foster public participation in proceedings before the Commission, there is no statute that requires all staff meetings with parties to be conducted in public. The first version of section 1710 stated simply that all meetings between staff and other parties should be public so that commissioners and advisors could be free to attend if they chose to do so. This rule proved difficult to observe given the massive amount of information and clarifications that must be obtained from the applicant during the course of a time-limited proceeding. In 1993, the Commission added subsection (h), which establishes an exception to the rule that all meetings must be public, allowing informal exchange of information and procedural discussions. Since 1993, staff has operated within the tension between the command that all meetings must be public and the allowance of informal exchange of information and discussion of "procedural" issues in private.

Although California law carefully guards against private discussions between litigants and judges, and similarly between license applicants and the agency decision-makers that must rule on their applications, section 1710 is unique in placing limits on discussion between parties to a proceeding. In most judicial or quasi-judicial settings, settlement of issues between and among parties is encouraged, and it is well-recognized that this is fostered by the ability of parties to communicate freely with one another without fear that their tentative proposals will later be used against them before the

decision-makers. Indeed, there are situations where issues are so complex and multiple parties are so far apart that professional mediators find they must start their process by meeting separately with each party to gain their confidence and understand their concerns before any effort to develop issue solutions can commence. To the extent that the Commission's staff might help to serve the role of mediator between and among parties so that the Commission need not conduct contested hearings on every issue, the restrictions in section 1710 make it very difficult for that to happen. In complex cases, the task becomes impossible and the opportunity to use mediation techniques in an effort to resolve issues and allow the case to be completed within one year is lost.

In some respects, it is not surprising that the restrictions in section 1710 are unique to the Energy Commission. The Warren-Alquist Act was the first to establish a Public Advisor to facilitate public participation in the Commission's proceedings, and the Act clearly reflects a particularly strong Legislative intent that the Commission value and foster public participation. I believe the Commission has honored that intent and would continue to do so even if the restrictions in section 1710 were relaxed sufficiently to allow staff to work with parties independently in an effort to resolve issues. There is a culture here that values public participation to a greater extent than at any other agency, and that culture can be fostered and maintained more effectively through good management than through an inflexible prohibition on private contacts. Nevertheless, those who strongly oppose any change to this rule seem to fear that if the rules permitted unrestricted staff negotiations with the Applicant privately, there would be an inexorable tendency for staff to avoid working with the public at all. While this fear is understandable and may have a legitimate basis, the Commission may not wish to allow it to control the rules that define how well the Commission can fulfill its most important regulatory function. Instead, the Commission may find it worthwhile to offer other commitments to meaningful public participation in an effort to ensure that more permissive rules on staff discussion of issues with parties do not lead to the adverse results that some fear.

The Commission must weigh the pros and cons of each potential action option in an effort to achieve the right balance between the Act's desire to foster public participation and the Act's expectation that the Commission will decide cases within a limited period of time. Both goals are important and both can be achieved, but the Commission should recognize that fair and efficient resolution of issues can sometimes be inhibited by restrictions on communication between and among parties. A restrictive regulation is not necessarily the best way to protect open public process. Instead, the Commission might takes steps to preserve the essential openness of its siting process through management policy and periodic review of staff performance. For example, the Commission might conduct a periodic public forum on the siting process for the purpose of allowing all participants in that process to provide input on how well the process is working from their perspective. In such forums, conducted once or twice a year, the Commission could regularly reinforce a set of principles and expectations for the conduct of staff. Among those principles would be:

(1) that while private staff contacts with other parties that are aimed at developing tentative proposals for resolving issues are permissible, they should be used sparingly and should not become the principal method of staff communication with other parties because that could lead to uneven understanding of the issues among parties and less opportunity for successful public participation;

(2) that more inclusive communications (e.g. workshops or conference calls) should be used when possible to allow all parties to remain "up to speed" during the course of the case; and

(3) that staff should make efforts, when important private communications do take place, to be sure that other parties are adequately informed of the information or issue resolution proposal that has been developed so that they will have a fair opportunity to respond when the matter is brought before the Committee or the Commission. Staff can use docketed reports of conversations, issue memos, status reports, or public workshops to fulfill this expectation for its conduct.

The Commission could make these public forums a regular and important part of its overall management of staff, providing to management either praise or criticism depending on how well it appeared that the public perceived these principles had been followed in the preceding period. Management, in turn, could provide guidance to specific employees through performance appraisals when it appears that they have conducted themselves according to the Commission's expectations or have strayed from them. These forums would allow both the public and staff and opportunity to discuss how the siting process has worked in practice during the preceding period and how it could be improved. The forums would also keep the Commission better informed of the day to day working of that process at the party level.

The remainder of this memo provides the options now before the Commission and presents an alternative option that would provide the staff more flexibility to perform a mediation role in complex cases.

Action Options for Section 1710

I. No Project Alternative

The regulation now reads:

Section 1710

(a) All hearings, presentations, conferences, meetings, workshops, and site visits shall be open to the public.

. . .

(h) Nothing in this section shall prohibit an applicant from informally exchanging information or discussing procedural issues with the staff without a publicly noticed workshop.

Comment: This option can be considered the default if no other option gains the support of at least three members of the Commission.

II. Commissioner Laurie's Proposal

Commissioner Robert Laurie has proposed to amend section 1710 to eliminate subsection (h) and to capture the intent of that subsection in subsection (a) as follows:

Section 1710

(a) All hearings, presentations, conferences, meetings, workshops, and site visits shall be open to the public and noticed as required by law; provided, however, these requirements do not apply to communications between parties, including staff, for the purpose of exchanging information or discussing procedural issues.

III. Commissioner Pernell's Proposal

Commissioner Pernell has proposed to amend section 1710 to leave subsection (a) as it is today and to add the following language to current subsection (h):

Section 1710

(a) All hearings, presentations, conferences, meetings, workshops, and site visits shall be open to the public.

. . .

(h) Nothing in this section shall prohibit an applicant from informally exchanging information or discussing procedural issues with the staff without a publicly noticed workshop. Staff shall not discuss or negotiate substantive changes to any siting project without public notice.

IV. The Staff Proposal

Staff proposes to amend section 1710 as follows:

Section 1710

(a) All committee and commission hearings, presentations, conferences, meetings, workshops, and site visits shall be publicly noticed and open to

the public. All other meetings with the staff shall also be noticed and open to the public except as provided in subsection (h).

. . .

(h) Nothing in this section shall prohibit an applicant or other party from informally exchanging information or discussing procedural issues with the staff without a publicly noticed workshop. Staff may meet with any governmental agency for the purpose of discussing any matter related to the project without a publicly noticed workshop. In no event shall the staff hold an unnoticed meeting with the applicant or another party, other than a governmental agency, to discuss or negotiate a settlement or resolution of one or more substantive issues, including substantive issues regarding data requests and responses.

V. An Alternative Proposal

The Commission could adopt a new version of section 1710 that recognizes a clear distinction between party-to-decisionmaker communications and party-to-party discussions and that allows the staff the flexibility required to provide a mediation role in appropriate cases. This rule would allow staff to exercise judgment when private meetings with the applicant or other parties might be necessary to move the case forward. The Commission could include in the rule provision for staff to make appropriate efforts to keep other parties informed when private discussions develop information and proposals that they need to know about prior to submission of such matters to the committee or commission. The Commission could require any proposed resolutions of issues that arise during private discussions to be shared with other parties prior to submission of the proposal to the Committee or Commission. The Commission could provide a cutoff date for such private discussions, thus encouraging early negotiations. The Commission could reinforce its commitment to openness of its process and fairness to all parties by adopting management principles, as suggested above, and by conducting regular public forums to hear how well the public believes the staff is implementing those principles. Overuse of this permission to conduct private meetings could be controlled through the public forums and through management performance appraisals. Here is one possible version of such a rule:

Section 1710

(a) All committee or commission hearings, presentations, conferences, meetings, workshops, and site visits shall be open to the public. All other meetings with the staff shall also be noticed and open to the public, except as provided in subsection (h).

. . .

(h) Nothing in this section shall prohibit an applicant or other party from informally exchanging information or discussing procedural issues with the staff without a publicly noticed workshop. Staff may meet with any governmental agency for the purpose of discussing any matter related to the project without a publicly noticed workshop. In addition, staff may meet privately at any time, prior to a cutoff date established by the Committee, with any party or participant (other than the decision-makers and their advisors) for the purpose of discussing a tentative resolution of any issue in the case. The Committee shall establish the cutoff date for such discussions to allow staff to conduct a publicly noticed workshop, as set forth below, at least 10 days prior to presentation of issue resolution proposals to the Committee or the filing of written testimony supporting the tentative proposed issue resolution. If, as a result of private issue resolution discussions, staff and any party or participant tentatively propose to resolve any issue concerning (1) compliance with laws, ordinances, regulations, or other standards, (2) compliance with CEQA, or (3) conditions of certification, the tentative proposal shall be the topic of a duly noticed public workshop held no later than 10 days prior to presentation of the proposal to the Committee or the filing of written testimony supporting the tentative proposed issue resolution. Issue resolution discussions between staff and other parties after the cutoff date are permissible if staff provides means to allow all parties to the proceeding to at least monitor the discussions and preferably to participate in them. Less inclusive issue resolution discussions may occur under the supervision of the Committee. Staff is encouraged to docket reports of conversations or other status reports for any informal discussions with the applicant if such reports would be useful to other parties concerning the resolution of issues in the siting case.